92-1276

NO. ____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHARLES J. REICH v. MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE

Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether a state violates the Due Process Clause when it collects taxes from its citizens in violation of the U.S. Constitution, provides its citizens a right to refunds for the unconstitutional taxation, and then eliminates the right to refunds after the time has run for any other relief.

PARTIES

The parties to this proceeding are the Petitioner, Charles J. Reich, and the Respondents, Marcus C. Collins, Sr. (Georgia Revenue Commissioner) and the Georgia Department of Revenue.

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NO.: _____

THE SUPREME COURT OF THE UNITED STATES

October Term 1992

CHARLES J. REICH, PETITIONER, V.
MARCUS E. COLLINS and THE GEORGIA
DEPARTMENT OF REVENUE, RESPONDENTS

On Petition for Writ of Certiorari to
the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

Charles J. Reich hereby petitions this Court for a Writ of Certiorari to the Supreme Court of Georgia.

OPINIONS BELOW

The November 19, 1992 opinion of the Supreme Court of Georgia (App. A) is reported at ___ Ga. ___, ___ S.E.2d ___ (1992). That court's order denying Petitioner's and Respondents' motions for reconsideration (App. B) is reported at ___ Ga. ___, ___ S.E.2d ____ (1992). The decision of the trial court (App. C) is unpublished.

JURISDICTION

The decision of the Supreme Court of Georgia was entered on November 19, 1992. Petitioner's Motion for Reconsideration (App. D) was denied by order of December 17, 1992. This petition is filed within the time allowed by law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment 14, Section 1

. . .

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4 U.S.C. § 111

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

O.C.G.A § 48-2-35(a)[1]

A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner.

[1]Full text of O.C.G.A § 48-2-35 is Appendix E.

STATEMENT

Before its repeal in September 1989, former O.C.G.A. § 48-7-27 exempted from state income taxation retirement benefits paid to state retirees while offering no exemptions for federal retirement benefits. Following this Court's March 1989 decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 109 S.Ct. 1500 (1989), Petitioner, a retired lieutenant colonel from the U.S. Army, followed established Georgia law and filed claims for tax refunds for 1985 through 1988 under Georgia's refund statute, O.C.G.A § 48-2-35. More than 25,000 other Georgia retirees also filed refund claims after *Davis*. Because the refund statute required Petitioner to wait one year from the filing of the claim to file suit, Petitioner and two other retirees joined together and also filed an equitable action for refunds in state court.

Later that year, in another equitable action brought by other retirees, the Georgia Supreme Court held that, "the refund statute (O.C.G.A § 48-2-35) provides an adequate remedy" for refunds sought in the wake of *Davis*. *Waldron v. Collins*, 259 Ga. 582, 583, fn. 1 (1989).

After that decision, the suit brought by Petitioner and others was dismissed by the trial court because the plaintiffs had not followed the procedural requirements

of the refund statute. *Salter, Reich and Neal v. Georgia, et. al.*, Sup. Ct. Fulton Co., Ga., File No. D-71448 (Order of Mar. 27, 1990, App. F).[2]

After this dismissal, and once Petitioner became eligible under the statute to file suit, he initiated this action challenging Georgia's former tax scheme and seeking refunds of illegally collected taxes. The trial court found that Georgia's scheme was unconstitutional and illegal under *Davis*, but held that *Davis* could not be applied retroactively based on *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971).

In the decision below (App. A), the Supreme Court of Georgia acknowledged that Georgia's income tax scheme violated 4 U.S.C. § 111 and intergovernmental immunity pursuant to *Davis*. The Georgia Supreme Court also reversed the trial court and held that *Davis* must be applied retroactively.

Contrary to existing Georgia authority, however, the Georgia Court held that Georgia's refund statute does not apply to an unconstitutional or invalid tax and denied Petitioner a refund under that statute. The Court further held, without authority, that a taxpayer must have made a demand for refund at the time the tax was

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[2]This order is not part of the record below because it was irrelevant to Petitioner's refund claims until the Ga. S. Ct. sua sponte ruled that the refund statute did not apply to his claims. Respondents did not propose the rationale adopted and did not argue that the refund statute did not apply.

paid in order to recover an unconstitutional or illegal tax.

This decision marked a clear break with existing Georgia law. Established Georgia case law held that the refund statute was applicable to unconstitutional taxes. The plain language of the refund statute mandates the refund of all taxes "illegally assessed and collected." Moreover, after *Davis*, State Revenue officials instructed taxpayers how to file refund claims.

The Due Process Clause question sought to be reviewed by this Petition was not created until the November 19, 1992 decision of the Supreme Court of Georgia. In accordance with the Rules of the Supreme Court of Georgia, Petitioner timely filed a Motion for Reconsideration alleging that the decision "violates fundamental due process." (App. Motion for Reconsideration, p. 1) (App. D). Appellant's Motion for Reconsideration was denied without opinion by Order of the Supreme Court of Georgia of December 17, 1992. (App. B).

REASONS FOR ALLOWING THE WRIT

Words cannot do justice to the injustice of this case. Petitioner spent a lifetime respecting and upholding the law. He served 20 years in the United States Army, including a tour in Vietnam where he believed he was fighting for democratic principles, including the rule of law. In the twilight of his retirement, he is now told by the Georgia Supreme Court that the law is meaningless when the interests of the State are involved.

This case presents the question of whether a state may collect taxes in violation of the Constitution and 4 U.S.C. § 111, provide its citizens a right to refunds for the illegal taxation, and then eliminate the right to refunds after the time has run for any other relief.

This case will affect more than 25,000 retirees in Georgia alone, and there are also at least six other *Davis* related cases filed with the Court. These cases largely raise the issue of retroactivity and relate to the remedy only as a secondary issue. Without definitive guidance from this Court, those states and others where *Davis* litigation is pending will struggle with the due process issues as it relates to remedies.

Courts in Georgia and South Carolina have already demonstrated the lengths to which they will go to destroy any remedy for retirees. Allowing the

decision below to stand would give states a free hand to impose discriminatory taxes because states will know the only risk they face is repeal of the offending statute.

I. GEORGIA HAS NOT PROVIDED ITS FEDERAL RETIREES A CLEAR AND CERTAIN REMEDY FOR UNCONSTITUTIONAL TAXATION.

In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 110 S.Ct. 2238 (1990), this Court held that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." 496 U.S. at 27, 110 S.Ct. at 2250. This court further held that the remedy provided must be "clear and certain." 496 U.S. at 32, 110 S.Ct. at 2248.

Georgia has failed to provide its federal retirees a clear and certain remedy for the discriminatory income taxes they have paid. Although the Georgia Supreme Court has proposed a new remedy (pay under protest), and the Respondents will offer up other remedies that were theoretically available, Georgia purported to provide its retirees with a remedy that was so clear and certain that more than 25,000 retirees pursued this remedy to the exclusion of all others. Petitioner and

other retirees followed the clear language of the refund statute, clearly established precedent, and directions of state officials in filing refund claims under the refund statute. Three years later, they are told the statute does not even apply.

Well before this Court decided *Davis*, in 1985 a group of Georgia federal retirees challenged the legality of the disparate tax treatment of state retirees and federal retirees under Georgia's income tax. Seeking class action certification in federal court, the plaintiffs argued that the Tax Injunction Act (28 U.S.C. § 1341) did not preclude federal jurisdiction. Accepting the arguments of the State of Georgia, the Eleventh Circuit concluded that Georgia taxpayers could bring an action for refunds pursuant to O.C.G.A § 48-2-35, and that Georgia law provided a plain, speedy and efficient remedy. *Waldron v. Collins,* 788 F.2d 736 (11th Cir. 1986).

Further, at least two other courts have held that Georgia's refund statute was an available remedy for the specific type of claims asserted by Petitioner. *See*, *Wetzel v. Collins,* 11th Cir. Case No. 90-9023, Judgment Order, September 19, 1991, affirming order of September 26, 1990, by Hon. Orinda D. Evans, U.S.D.C., No. Dist. Ga., Case No. 1:89-CV-758, and *Waldron v. Collins,* 259 Ga. 582 (1989).

Additionally, the Georgia Supreme Court has previously held that the refund statute applies to claims for refunds of unconstitutional taxes. *See e.g.*, *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972) (constitutional challenge to sales tax dismissed because taxpayers failed to follow procedures of refund statute); *Wright v. Forester*, 192 Ga. 864, 16 S.E.2d 873 (1941) (refund statute, not mandamus, is proper procedure for recovery of tax alleged to be unconstitutional). In fact, no Georgia court prior to the instant case had ever denied refunds under the state refund statute for the reason that the taxpayer could have contested the tax without paying it first.

Regardless of the merit of any other remedy, the purported availability and attractiveness of the refund statute makes Georgia's entire remedial scheme unclear and uncertain. For, if the refund statute is inapplicable as the Georgia Supreme Court has now held, Georgia retirees were required to play remedy roulette. Retirees were required to choose from several apparent remedies. If they placed their bets on the "wrong" remedy, they lost the gamble, the illegal tax and any right to a refund.

Even if Georgia offered other remedies that satisfied Due Process, the overall scheme was unclear and uncertain because of the apparent availability of the refund statute. Thus, the clear and certain mandate of *McKesson* is not met by Georgia law.

Furthermore, not only does the overall scheme fail due process, the individual remedies proposed by the Respondents and by the Georgia Supreme Court do not pass muster under the Due Process Clause. The Respondents have previously argued that Petitioner could have refused to pay the tax, awaited an assessment by the State, and then raised the illegality of the tax in defense to an action initiated by the State. There are several due process problems, though, with this procedure. First, the taxpayer is subject to a penalty equal to 25% of the tax due[3] as well as interest at the rate of 12% per annum.[4] As this Court noted in *McKesson*, "We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real personal property, the tax is paid 'under duress' in the sense that the State has not provided a fair and meaningful deprivation procedure." 496 U.S. at 30, 110 S.Ct. at 2251, fn. 21, citing *United States v. Mississippi Tax Comm'n.*, 412 U.S. 363, 368, 93 S.Ct. 2183, 2187 (1973). A penalty of 25% is a significant financial sanction for retirees living on pensions.

Additionally, the assessment procedure is wholly within the discretion of the Revenue Commissioner.[5]

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[3]O.C.G.A. § 48-7-86.

[4]O.C.G.A. § 48-2-40.

[5]O.C.G.A. § 48-2-46.

The State has available additional remedies of levy, garnishment, and attachment.[6] Significantly, the taxpayer is also subject to criminal prosecution.[7] None of these remedies available to the State are automatically precluded by a protest. Indeed, in *Wright v. Forester*, 192 Ga. 864, 16 S.E.2d 873 (1941), the taxpayer challenged a tax as unconstitutional but was persuaded to pay the tax by threats of penalties and criminal prosecution.

For retirees, the "stick" of these sanctions is onerous, particularly when contrasted with the "carrot" of the apparent availability of a refund remedy that includes interest at 9%. This explains why retirees filed 86,000 claims for refunds.

Additionally, the remedy enacted by the Georgia Supreme Court, pay under protest, was not clear and certain before November 1993 because it was unknown before then. The Georgia court cites no statutory or case authority for its new law. While there are old Georgia cases that require protest to prevent a payment from being deemed "voluntary," these authorities were overruled by the refund statute which expressly mandates refunds of illegal taxes "whether paid voluntarily or involuntarily."

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[6]O.C.G.A. § 48-2-55.

[7]O.C.G.A. § 48-7-2.

Indeed, until the Georgia Supreme Court's recent enactment, even the State itself did not believe a protest was necessary. *James B. Beam Distilling Co. v. Georgia,* 501 U.S. ___, 111 S.Ct. 2439 (1991) was another case in which a Georgia taxpayer sought refunds of unconstitutionally collected taxes. In oral argument the State represented to this Court that, "there is no requirement for protest in Georgia. The refund statute does not require a protest." (Official Transcript, October 30, 1990, p. 31).

As this Court held in *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 682, 50 S.Ct. 451, 454 (1930), "[a] state may not deprive a person of all existing remedies for the enforcement of a right" unless there is "afforded to him some real opportunity to protect it." The Georgia Supreme Court has in fact deprived Petitioner of all remedies. It has enacted legislation repealing the refund statute and creating a new remedy that is and was unavailable to Petitioner.

In summary, Georgia's individual remedies do not satisfy Due Process. The predeprivation remedies expose a taxpayer to financial and criminal sanctions, while the pay under protest remedy was only created in November, 1992. Even if any of these remedies were somehow found to satisfy Due Process, the overall scheme was unclear and uncertain because of the apparent availability of a refund procedure.

II. THE GEORGIA SUPREME COURT DEPRIVED PETITIONER OF HIS PROPERTY RIGHTS WITHOUT DUE PROCESS.

The State of Georgia was under no obligation to adopt a statutory refund procedure. It could have adhered to its common law rule that required payment under compulsion, duress or protest in order to obtain a refund. Instead, it followed the federal model and provided for refunds of voluntarily paid taxes upon compliance with certain requirements. Case law established that this procedure was applicable to unconstitutional taxes. The right of a taxpayer to the use of this procedure is a species of property protected by the Due Process Clause. *Cf., Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982) (protectable property interest held to exist in fair employment procedure created by state statute).

The Georgia Supreme Court's refusal to award refunds arbitrarily deprives Petitioner of the property interest created by the statute and these cases. The rationale offered by the Court has little to do with Petitioner or other retirees. The reference to a tax passed on to the consumer (p. 9A, infra) ignores the facts of this case. This reference makes sense only in the context of the *Beam* case which is still pending two years after this Court's remand.

The Court does not find that the refund statute is illegal or unconstitutional. The Court does not even address its earlier decisions. Rather, the Court tortures the plain language of the statute to conclude the statute doesn't apply, and its decision deprives Petitioner of a property right under Georgia law without notice or a meaningful opportunity to be heard.

CONCLUSION

For the reasons set forth above, Petitioner requests that this petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF GEORGIA

Decided: November 19, 1992

S92A0621: REICH V. COLLINS, ET. AL.

S92A0622: REICH V. COLLINS, ET. AL.

CLARKE, Chief Justice

We granted the appellant's application to appeal, OCGA § 5-6-35(a), to consider the issue of his entitlement to a refund of state income taxes paid on his federal military retirement benefits in view of the United States Supreme Court's decision in *Davis v. Michigan,* 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989).

Former OCGA § 48-7-27 created an income tax exemption for retirement benefits paid by the State of Georgia to retired state employees. No such exemption existed for retirement benefits paid by the federal government to retired federal employees residing in

Georgia. In *Davis v. Michigan,* supra, the United States Supreme Court held that Michigan's taxing scheme, which exempted from state income taxation all state retirement benefits, but taxed all federal retirement benefits, violated the constitutional principles of intergovernmental tax immunity, as well as 4 U.S.C. § 111.[1] Because the state of Michigan conceded that a refund would be due the taxpayer if the Court found its taxing scheme to be unconstitutional, it was not necessary for the Court to determine the merits of the taxpayer's claim for a refund. The case was remanded to the Michigan courts to comply with the Court's "mandate of equal treatment," *Davis*, 489 U.S. at 818, in determining whether the taxpayer was entitled to prospective relief from discriminatory taxation.

Following the decision in *Davis v. Michigan,* the Georgia legislature, in special session, repealed that portion of OCGA § 48-7-27 which granted retired state employees an exemption from income taxation on their retirement benefits. Shortly thereafter, appellant, a retired colonel in the United States Army, filed a claim with the appellee Department of Revenue for a refund of income taxes he had paid to the State of Georgia on

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[1]This code section permits the States to tax "pay or compensation for personal services as [a federal] officer or employee. . . if the taxation does not discriminate against the employee because of the source of the pay or compensation."

his military retirement benefits. The Department denied his claim, and appellant brought this action pursuant to OCGA § 48-2-35.

The case came before the trial court on cross-motions for summary judgment. The trial court concluded that former OCGA § 47-7-27 violated the principles of *Davis v. Michigan,* supra, and partially granted the appellant's motion for summary judgment on this issue. However, after analyzing the case under *Chevron Oil v. Huson,* 404 US 97 (92 SC 349, 30 LE2d 296) (1971), the trial court held that *Davis v. Michigan* should not be applied retrospectively. The trial court therefore concluded that the appellant was not entitled to a refund, and granted the appellee's motion for summary judgment in this regard.

The appellant concedes that if this court determines that he is entitled to a refund, he will be eligible only for the taxable years 1985 through 1988.

1. We agree with the trial court that the principles of *Davis v. Michigan* apply to this case.[2] However, we have determined that, with regard to the issue of retroactive application, the case must be analyzed under *James B. Beam v. Georgia,* 501 U.S. ___ (111 SC 2439, 115 LE2d 481) (1991), rather than the test set out in *Chevron Oil,* supra.

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[2]We note that the State did not appeal this ruling by the trial court.

In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (104 SC 3049, 82 LE2d 200 (1984), the U.S. Supreme Court held that Hawaii's taxing scheme, which distinguished between imported and locally distilled alcohol products, violated the Commerce Clause. Following this decision, James B. Beam Distilling Company filed a suit for refund of taxes it had paid to the State of Georgia, claiming entitlement to the refund under *Bacchus*. In *James B. Beam v. State of Georgia*, 259 Ga. 363 (382 SE2d 95) (1989), this court recognized that Georgia's taxing scheme, which imposed a higher tax on alcoholic beverages imported into the state than on alcohol produced in this state, violated the principles of *Bacchus*, supra. However, analyzing the case under *Chevron Oil*, supra, we held that the trial court did not err in applying the *Bacchus* decision prospectively only. The U.S. Supreme Court granted certiorari to our decision in *Beam* and reversed, holding that *Bacchus* should have been applied retroactively to our decision in *Beam*.

The U.S. Supreme Court held that where, in a civil case such as *Bacchus*, it does not reserve the question of whether the holding should be applied retroactively, the decision "is properly understood to have followed the normal rule of retroactive application in a civil case," 115 LE2d. at 490, and thus the decision is to be applied not only to the parties before it, but "to

all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitation." *Id.* at 488. The Court held that it is error for a lower court to refuse to apply a rule of federal law retroactively after the case announcing it has already done so. *Id.* at 491. The Court went on to distinguish between the issue of retroactivity where a federal law or constitutional question is raised, and the issue of remedies, "i.e., whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one." *Id.* at 487. In the normal circumstance, the issue of retrospectivity, or choice of law, is a federal question, while the remedial inquiry is left to the states. *Id.* at 488. The Court stated, as a general guideline, that when it remands a case to a lower court for consideration of any remedial issues, this "necessarily implies" that the choice of law, or retroactivity, question has been decided, and that the Court will apply its decision not only to the parties before it, but retrospectively to all others not procedurally barred. *Id.* at 490-491.[3]

The State's argument in the case before us is that because it cannot be determined from the Court's

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[3]The Court held in *Beam* that principles of "equality and stare decisis" prevail over the *Chevron Oil* analysis, *Beam*, 115 LE2d at 491, and that the need to ensure that the substantive law "will not shift and spring," *Id.* at 493, limits the "possible applications of *Chevron Oil*." *Id.*

opinion in *Davis v. Michigan* that the case was remanded for consideration of remedial issues since Michigan had conceded that a refund was due the taxpayer, it cannot be concluded that the Supreme Court intended retroactive application of the *Davis* decision. We do not agree.

As we read *Davis v. Michigan*, the Court applied its decision to the taxpayer before it. The State of Michigan conceded that if the Court found its taxing scheme to be unconstitutional, then, under state law, the taxpayer would be entitled to a refund. Once the Supreme Court determined that Michigan's taxing scheme was unconstitutional and applied that principle to the taxpayer, Michigan conceded that the taxpayer was entitled to a refund. It does not follow that if the Supreme Court had determined that its decision in *Davis* was to be prospective only,[4] and thus not applicable to the litigants before it, that the state of

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[4]See *Beam*, 115 LE2d at 488 for a discussion of prospective application of court decisions. Under the Court's analysis, the prospective method of overruling cases does not apply the new rule to the parties in the case, but only uses the case as a vehicle for announcing a new rule of law. The principle of selective prospectivity, in which the new rule is applied to the litigants before the court, has been abandoned in the criminal context, see *Griffith v. Kentucky*, 479 U.S. 314 (107 SC 708, 93 LE2d 649) (1987), and "appears never to have been endorsed [by the Court] in the civil context." *Beam*, 115 LE2d at 490.

Michigan would have conceded the taxpayer was due a refund.

Further, the issue of whether *Davis v. Michigan* is to be applied retroactively is foreclosed by the Supreme Court's decision in *Barker v. Kansas*, ___ U.S. ___ (112 SC 1619, ___ LE2d ___) (1992). In that case military retirees challenged the Kansas income taxation scheme which permitted taxation of federal retirement benefits while exempting from taxation state retirement benefits. The U.S. Supreme Court held that this case was controlled by *Davis v. Michigan*. The Court reversed and remanded to the lower court for a determination of the remaining issues, including the taxpayers' entitlement to refunds of taxes previously paid. As such, it is clear that the Court applied the decision of *Michigan v. Davis* retroactively to the litigants in *Barker*, just as the Court applied the *Bacchus* decision retroactively to the litigants in *James Beam*.[5]

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[5]We further note that the Virginia Supreme Court analyzed an identical tax issue under the principles of *Chevron Oil*, and determined that *Davis v. Michigan* is not to be applied retroactively. *Harper v. Virginia Dept. of Taxation*, 401 SE2d 868 (Va. 1991). The U.S. Supreme Court granted certiorari as to this decision, vacated the judgment of the Virginia Supreme Court, and remanded for consideration in light of its decision in *James Beam*. 59 USLW 3863 (July 2, 1991). On remand the Virginia Supreme Court concluded that *James Beam* does not require retroactive application of *Davis v. Michigan*. 410 SE2d 629 (1991). On May 18, 1992, the U.S. Supreme Court granted certiorari to that decision. 60 USLW 3779.

We thus conclude that the trial court correctly held that OCGA § 47-7-27 violated the principles of *Davis v. Michigan*, but erred in holding that this case does not apply retroactively.

2. The issue of what remedy is to be afforded the appellant remains. This is a question of state law. *Beam*, supra, 115 LE2d at 488. As the Supreme Court stated in *Beam*, nothing deprives the State of its "opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided. . ." *Beam*, 115 LE2d at 494.

OCGA § 48-2-35(a) provides, in part, that "a taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily . . ." (Emphasis supplied.) We hold that this statute contemplates the situation where a taxing authority erroneously or illegally assessed and collects a tax under a valid law. It does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid. This distinction is significant in that the State must be able to rely on the laws under which it assesses taxes in order to promote stable and efficient government. Furthermore, this protects the State against

those instances in which a vendor/taxpayer has recouped its tax expense by passing it on to the consumer. See, e.g., *Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295(1) (149 SE2d 691) (1966); *Blackmon v. Ga. Ind. Oilmen's Assn.*, 129 Ga. App. 169 (198 SE2d 900) (1973). Were we to interpret the statute differently, the vendor/taxpayer would realize a windfall or double recovery not intended by the legislature.

Thus we conclude that the taxpayer is not entitled to a refund under the provisions of OCGA § 48-2-35(a).

We that this opportunity to hold that in cases in which a taxing statute is declared unconstitutional or otherwise void, a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last. Failure to do so bars any future claim.

Judgment affirmed in part and reversed in part. Hunt, Benham, and Fletcher, JJ., concur; Sears-Collins, J., concurs in judgment only; Bell, P.J., disqualified.

APPENDIX B

IN THE SUPREME COURT OF GEORGIA

December 17, 1992

The Honorable Supreme Court met pursuant to adjournment. The following Order was passed:

CHARLES J. REICH V. MARCUS E. COLLINS, SR., COMR., ET. AL.

Upon consideration of the Motions for Reconsideration filed in these cases, it is ordered that they be hereby denied. All the Justices concur, except Bell, P.J., disqualified, and Hunstein, J., not participating.

APPENDIX C

IN THE SUPERIOR COURT OF CLAYTON COUNTY
STATE OF GEORGIA

CHARLES J. REICH,	)	
	)	
Plaintiff,	)	CIVIL ACTION FILE
	)	NO.: 90-cv-18388-4
v.	)	
	)	FILED: Dec. 11, 1991
MARCUS E. COLLINS, SR.,	)	
Individually and in his	)	
capacity as Georgia State	)	
Revenue Commissioner, and the	)	
GEORGIA DEPT. OF REVENUE,	)	
	)	
Defendants.	)	
	)	

ORDER

FACTS:

This action was filed April 19, 1990, as a complaint for refund of income taxes paid on military

retirement income during the years 1980 through 1988. Under a previous Georgia law, Section 48-7-27, O.C.G.A., repealed in 1989, retirement income from state government was exempted from income taxation while retirement income from the federal government was not. In *Davis v. Michigan Department of the Treasury,* 489 U.S. 803 (1989), the United States Supreme Court struck down a similar Michigan law both on constitutional grounds and because it violated 4 U.S.C. Section 111. The Plaintiff contends that taxes collected on his military retirement benefits during the years of 1980 through 1988 must be refunded to him in light of this decision. Defendants Marcus E. Collins and the Georgia Department of Revenue have filed a Motion for Summary Judgment on several grounds. The Plaintiff has also moved this Court to grant his Motion for Summary Judgment. These Motions for Summary Judgment were argued on October 18, 1991.

ISSUES PRESENTED:

I. Whether under Georgia law the statute of limitations will permit the Plaintiff's claim?

II. Whether Georgia's income tax treatment was not violative of the principles of *Davis*?

III. Whether *Davis* should be applied retroactively?

DISCUSSION:

I. Whether under Georgia law the statute of limitations will limit the Plaintiff's claim?

Section 48-2-35(b)(1), O.C.G.A., provides that a claim for the refund of a tax illegally assessed and collected may be made anytime within three (3) years after the date of the payment to the commissioner. Because the statute is a waiver by the State of its sovereign immunity, it must be strictly enforced. *Ingalls Iron Works Company v. Blackmon,* 133 Ga. App. 164 (1974). This statute of limitations applies even where the refund is based in part on federal law. *McKesson v. Division of Alcoholic Beverages and Tobacco,* 58 U.S.L.W. 4665 (U.S. June 4, 1990); *Michael v. Louisiana,* 350 U.S. 91 (1955). In the case de jure the Plaintiff contends that the three-year statute of limitation codified in O.C.G.A., 48-2-35, should not apply to those taxes collected under an unconstitutional statute, citing the Georgia Supreme Court's reasoning in *James B. Beam Distilling Co. v. Georgia,* 259 Ga. 363, 382 S.E. 2d 95 (1989). The Georgia Supreme Court in *Beam* merely defines the authority which was conferred upon the courts to determine retroactivity of its decision under O.C.G.A., 48-2-35. *Beam* does not, as the Plaintiff argues, reject the basic tenets of O.C.G.A., 48-2-35, as it

applies to taxes assessed under an unconstitutional statute. Therefore, because the Plaintiff's claims were filed in April of 1989, and the statute of limitations does not apply, the Plaintiff could get no refund for taxes paid in 1980 through 1984.

II. Whether Georgia's income tax treatment was not violative of the principles of *Davis*?.

The Defendants argue that the repealed Georgia statute must be sustained if it bore a reasonable relation to a legitimate state purpose. *Exxon Corporation v. Eagerton,* 462 U.S. 176 (1983). They point out that the preferential income tax treatment given to state retirees is designed to enable the State to hire better employees.

Federal law, however, expressly prohibits state taxation plans which discriminate against federal employees based solely on the source of the pay or compensation. 4 U.S.C., Section 111 (1939). The court in the *Davis* case found that Michigan's discriminatory tax scheme, which was almost identical to Georgia's, violated this statute. In *Davis*, Michigan was not able to demonstrate "significant differences" between federal civil service retirement income and the state retirement income exempted from taxation.

The Defendants before this Court contend that there are significant differences between military

retirement pay and state retirement pay because military retirees are still subject to being ordered back into service. Thus, their pay is, at least in part, pay for present services. *McCarty v. McCarty*, 453 U.S. 210, 221-222 (1981).

This argument does not account for the fact that the Georgia statute at issue taxed all federal civil service retirement pay, not specifically military benefits. Thus, it is difficult to accept the Defendants' claim that by taxing military retirement while exempting state retirement, the State was merely taxing a reduced current pay for reduced services. Therefore, because the sole distinction between the two groups of taxpayers is the source of income, one state and one federal, the statute which treated these taxpayers differently violated the principles of *Davis*.

III. Whether *Davis* should be applied retroactively?

In *Davis v. Michigan Department of The Treasury*, 489 U.S. 803 (1989), the Michigan Department of The Treasury conceded that should its tax scheme be found illegal, the plaintiff, Davis, would be entitled to a refund. For this reason, the U.S. Supreme Court did not reach the issue of whether its decision should be applied retroactively. This silence leaves the issue of retroactivity

to be resolved by the valid three-pronged test of *Chevron Oil v. Hudson,* 404 U.S. 97, 106-107 (1971). For a decision to be applied non-retroactively, it must first establish a new principle of law. Second, courts must look to the purpose of this rule to determine whether retroactive application will further or retard its operation. Third, courts must weigh the inequities or hardships imposed by retroactive application.

Three other state supreme courts, in North Carolina, South Carolina and Virginia, have already applied this *Chevron Oil* test to the *Davis* decision and decided that *Davis* applies prospectively only. *Ball v. State,* 395 S.E.2d 171 (S.C. 1990); *Harper v. Virginia Department of Taxation,* 241 Va. 232, 401 S.E.2d 868 (1991); *Swanson v. State of North Carolina,* No. 64PA91 (N.C. S.Ct., filed Aug. 14, 1991).

The *Davis* decision does not seem to be one that should be applied retroactively under the *Chevron Oil* test. According to Defendants' Brief in Support of Motion for Summary Judgment, at page 16, twenty-two (22) states other than Georgia had tax statutes similar to Michigan's. Thus, *Davis* did announce a new rule of law which was not clearly foreshadowed by prior decisions. Moreover, retroactive application would not further the principles of intergovernmental tax immunity, which is to attract qualified individuals to federal employment. Instead, retroactivity would act to punish the State for its

past treatment of federal retirees. Finally, the equities are in favor of prospective application only, as retroactive application could create a hardship for the Defendants.

ORDER OF COURT

Wherefore, for the reasons discussed above, Defendants' Motion for Summary Judgment is hereby granted on the basis that *Davis v. Michigan* does not apply retroactively. It is also granted in part since the statute of limitations has run on claims for refunds of taxes paid in the years 1980 through 1984.

Likewise, the Plaintiff's Motion for Summary Judgment is granted in part in that the Georgia statute in question was violative of the principle set forth in *Davis*. Other than as previously stated, the Plaintiff's and the Defendants' Motions for Summary Judgment are hereby denied.

SO ORDERED this 10th day of December, 1991.

/s/_____

KENNETH KILPATRICK
Judge, Superior Court
Clayton Judicial Circuit

APPENDIX D

IN THE SUPREME COURT OF GEORGIA

CHARLES J. REICH,	)	
	)	
Appellant,	)	
	)	CASE NOS: S92A0621
v.	)	S92A0622
	)	
MARCUS E. COLLINS, SR.,	)	
	)	
Appellee.	)	
	)	

MOTION FOR RECONSIDERATION

COMES NOW Charles J. Reich, Appellant in the above matter, and moves this Court for reconsideration of its decision of November 19, 1992 because the decision of this Court violates fundamental due process and cannot be sustained on appeal.

Since 1985 Georgia has told its federal retiree citizens that their remedy for any taxes illegally collected under 4 U.S.C. § 111 was Georgia's refund statute, O.C.G.A § 48-2-35. In *Waldron v. Collins,* 788 F.2d 736

(11th Cir. 1986), Georgia used the existence of the refund statute to defeat federal jurisdiction in a challenge based on 4 U.S.C. § 111. After *Davis v. Michigan* was decided on March 28, 1989, the State told these citizens to file claims under the refund statute. The State continued to collect 1988 taxes even on returns filed after *Davis*. (Most returns were due on April 17, 1989).

Retirees were told that they could not file claims for years before 1985 because of the three year limitation period in the refund statute, and they were told that a claim for 1985 had to be filed on or before April 17, 1989. (*See, e.g.*, Ex. 2, Dep. of H. Thomassen). The Revenue Department's computerized computation of claims shows that retirees followed this advice by the thousands. (Ex. 5, Dep. of H. Thomassen). Almost 40,000 retirees filed 1985 refund claims. Most retirees filed their 1988 claims at a later date, if at all.

Three years later, this Court tells retirees that they should have ignored the refund statute and state officials because retirees had to file for 1988 on or before April 17, 1989, even though they had no notice of this procedure. By virtue of this Court's decision, the state affirmatively misled its federal retirees. Even without this circumstance, it is unconscionable to allow the State to collect and keep a tax after the U.S. Supreme Court has declared the tax unconstitutional. This is a patent

violation of fundamental due process, and this holding cannot be sustained.[1]

Further, the decision of this Court is so extreme and erroneous that it astronomically increases the risk to the state treasury from pending retiree and liquor tax refund claims. By unnecessarily eviscerating the refund statute, the Court leaves the state with no procedural defenses. The state now faces the real possibility that the U.S. Supreme Court will mandate refunds as a remedy just as it did in *McKesson Corp. v. Fla. Alcb. & Tob. Div.*, 496 U.S. 18, 110 S.Ct. 2238 (1990). Without the procedural barriers of the refund statute, the state will have to refund all taxes to retirees regardless of whether retirees submitted claims under the refund statute. This could increase the amount in issue fivefold. Additionally, the limitation period in the refund statute would not apply, so retirees could claim refunds back to the enactment of O.C.G.A § 48-7-27 in 1980. These barriers would also disappear in the liquor tax cases.

The tragedy is that the Court does not have to take these risks. There are enforceable procedural barriers in place under the refund statute that the Court can utilize to limit the state's exposure to refund claims

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[1]At a minimum, the Court should allow refunds for 1988 for all taxpayers who filed a claim for any year on or before April 17, 1989. Surely those taxpayers would have filed a refund claim for 1988 at that time if they had had notice that was required.

in retiree and liquor tax cases. First, the statute limits refunds to claims made. Further, a reasonable reading of 48-2-35(b)(5) requires taxpayers to file suit within three years from the time the claim was made. (More than 2,500 taxpayers have filed suit based on this construction). The time has now passed for virtually all retiree taxpayers, and this procedural barrier reduces the state's exposure from $90 million to something on the order of $20 million. For tactical reasons, the Revenue Commissioner has opposed this interpretation. But this construction of the statute would be virtually unassailable on appeal. It would constitute a state's interpretation of an ambiguous provision of its own refund statute.[2]

Finally, in the liquor tax cases, Georgia law has established that the taxpayer has the burden of proving that it has standing in order to bring a claim under the refund statute. *Blackmon v. Ga. Ind. Oilmen's Assn.*, 129 Ga. App. 169, 198 S.E.2d 900 (1973). In other words, the out of state distillers have the burden of proving that they sustained the economic burden of the

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[2]Moreover, there would be no appeals in the immediate future because all pending litigants would receive limited refunds. If there is to be Supreme Court review of Georgia's procedural limitations, this review would occur in the context of the liquor tax rather than the tax on federal retirees.

illegal tax and that they did not pass the effect of this tax to Georgia consumers. If they cannot meet this burden, they have no standing under the refund statute. As a pre-existing procedural requirement of the refund statute, this limitation is valid under *McKesson*.

McKesson does say that a state cannot bar refunds to a taxpayer on the speculative theory that the taxpayer might enjoy a windfall. *McKesson* is careful, though, to draw a distinction between the speculative use of this pass on argument as an equitable consideration and the separate requirement of an economic burden for standing. The former is precluded by *McKesson*, but the latter is allowed. *See McKesson*, 110 S.Ct. at 2255-2257 and fn. 34. In fact, *McKesson* emphasizes the enforceability of procedural limitations generally.

All of these procedural protections that exist within the framework of the refund statute are destroyed by this Court's decision of November 19. The Court effectively takes a long shot gamble that the new procedure it announces can sustain a due process challenge. If the gamble is successful, no refunds will be paid to retirees or out of state distillers. If the gamble fails, the state's liability for refunds is dramatically increased.

Clearly a better and fairer result is to pay refunds to those retirees who have passed over all of the procedural hurdles of the refund statute. The state will

face a certain but modest liability for refunds. The refund statute will remain valid, and the state significantly increases its chances of refunding taxes only to distillers who can carry their burden of proving they suffered an economic loss. Appellant respectfully urges the Court to allow refunds to those retirees who filed timely claims and who initiated litigation within three years from the time of filing.

Respectfully submitted,

McALPIN, HENSON & KEARNS

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(404) 239-0774

APPENDIX E

O.C.G.A. § 48-2-35

(a) A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. Refunds shall be drawn from the treasury on warrants of the Governor issued upon itemized requisitions showing in each instance the person to whom the refund is to be made, the amount of the refund, and the reason for the refund.

(b) (1) A claim for refund of a tax or fee erroneously or illegally assessed and collected may be made by the taxpayer at any time within three years after the date of the payment of the tax or fee to the commissioner. Each claim shall be filed in writing in the form and containing such information as the commissioner may reasonably require and shall include a summary statement of the grounds upon which the taxpayer relies. Should any person be prevented from filing such an application because of his own or his

counsel's service in the armed forces during such period, the period of limitation shall date from his or his counsel's discharge from the service.

(2) In the event the taxpayer desires a conference or hearing before the commissioner in connection with any claim for refund, he shall specify such desire in writing in the claim and, if the claim conforms with the requirements of this Code section, the commissioner shall grant a conference at a time he shall reasonably specify.

(3) The commissioner or his delegate shall consider information contained in the taxpayer's claim for refund, together with such other information as may be available, and shall approve or disapprove the taxpayer's claim and notify the taxpayer of his action.

(4) Any taxpayer whose claim for refund is denied by the commissioner or his delegate or whose claim is not decided by the commissioner or his delegate within one year from the date of filing the claim shall have the right to bring an action for a refund in the superior court of the county of the residence of the taxpayer, except that:

(A) If the taxpayer is a public utility or a nonresident, the taxpayer shall have the right to bring an action for a refund in the superior court of the county in which is located the taxpayer's principal place of doing business in this state or in which the taxpayer's chief or highest corporate officer or employee resident in this state maintains his office; or

(B) If the taxpayer is a nonresident individual or foreign corporation having no place of doing business and no officer or employee resident and maintaining his office in this state, the taxpayer shall have the right to bring an action for a refund in the Superior Court of Fulton County or in the superior court of the county in which the commissioner in office at the time the action is filed resides.

(5) No action or proceeding for the recovery of a refund under this Code section shall be commenced before the expiration of one year from the date of filing the claim for refund unless the commissioner or his delegate renders a decision on the claim within that time, nor shall any action or proceeding be commenced after the expiration of two years from the date the claim is denied. The two-year

period prescribed in this paragraph for filing an action for refund shall be extended for such period as may be agreed upon in writing between the taxpayer and the commissioner during the two-year period or any extension thereof.

(c) In the event any taxpayer's claim for refund is approved by the commissioner or his delegate and the taxpayer has not paid other state taxes which have become due, the commissioner or department may set off the unpaid taxes against the refund. When the setoff authorized by this subsection is exercised, the refund shall be deemed granted and the amount of the setoff shall be considered for all purposes as a payment toward the particular tax debt which is being set off. Any excess refund remaining after the setoff has been applied shall be refunded to the taxpayer.

APPENDIX F

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AVERY T. SALTER, JR., CHARLES J. REICH, and ROBERT L. NEAL,	)	
Plaintiffs,	)	
	)	CIVIL ACTION FILE
v.	)	NO. D-71448
THE STATE OF GEORGIA, GOVERNOR JOE FRANK HARRIS, AND STATE REVENUE COMMISSIONER MARCUS E. COLLINS, SR.,	)	
Defendants.	)	

ORDER

Upon full consideration of the entire record, Respondents' Motion to Dismiss or for Judgment on the Pleadings is hereby GRANTED.

Because of the Doctrine of Sovereign Immunity, the State may not be sued without its consent. Any consent to be sued which is extended by the State may not be expanded in scope and therefore must be strictly construed. *Ingalls Iron Works Company v. Blackmon,* 133 Ga. App. 164 (1974), citing *Schaffer v. Oxford,* 102 Ga. App. 710 (1960). Section 48-2-35(b)(4) of the Official Code of Georgia Annotated expressly waives sovereign immunity and allows for actions for tax refunds be brought against the State. However, a condition precedent to the State's consent to be sued pursuant to O.C.G.A § 48-2-35 is the filing of a claim for refund by the taxpayer. *Blackmon v. Georgia Independent Oilman's Association et al.,* 129 Ga. App. 171, 173 (1973), citing *Henderson v. Carter,* 229 Ga. 876 (1972).

Plaintiffs have failed to satisfy the condition precedent to waiver of sovereign immunity under O.C.G.A § 48-2-35. Neither Plaintiffs' Petition for Declaratory Judgment and Injunctive relief nor any of the amendments thereto allege facts asserting that Plaintiffs have filed a claim for a refund as required by O.C.G.A § 48-2-35(b)(4). Accordingly, Plaintiffs cannot, as a matter of law, have standing to sue and Defendants' Motion to Dismiss should be and is hereby GRANTED. See Id.

This 27th day of MARCH, 1990.

/s/_____

Joel J. Fryer

Judge, Fulton Superior Court, A.J.C.